A

TEO CHEE KONG v. PP

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
RAVINTHRAN PARAMAGURU JCA
LEE HENG CHEONG JCA
B [CRIMINAL APPEAL NO: S-06A-18-06-2018]
14 JUNE 2021

CIVIL PROCEDURE: *Jurisdiction – High Court – Criminal trial – Constitutional questions – Application to High Court to refer constitutional questions to Federal Court for determination – High Court Judge ('HCJ') answered questions in negative and did not refer questions to Federal Court – Criminal trial ordered to proceed – Whether HCJ erred in answering constitutional questions – Whether HCJ acted within powers in not referring questions to Federal Court and ordering trial to proceed – Whether discretion not to refer questions to Federal Court exercised correctly – Whether constitutional questions ought to be remitted to another HCJ for rehearing – Courts of Judicature Act 1964, ss. 30 & 84*

C

D

The police launched a corruption investigation involving senior officers of the Sabah Water Department of which the appellant was the deputy director. However, unlike the other senior officers, the appellant was not immediately charged. Instead, the prosecution commenced forfeiture applications on the cash monies seized from the appellant, the monies in his bank accounts and his landed properties. The appellant was only brought to the Sessions Court some 14 months later where 146 charges of money laundering under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUAA') were preferred against him ('AMLATFPUAA charges'). The appellant applied (i) at the High Court, to set aside the AMLATFPUAA charges against him ('application to set aside the AMLATFPUAA charges'); and (ii) at the Sessions Court to refer ten constitutional questions to the High Court, under s. 30 of the Courts of Judicature Act 1964 ('CJA') ('application under s. 30 of the CJA'). As there was fear of 'duplicity', since both applications were filed around the same time, the appellant withdrew the application under s. 30 of the CJA. The High Court dismissed the application to set aside the AMLATFPUAA charges and, following that, the appellant filed an application at the High Court to refer the same ten constitutional questions, with the addition of two new questions ('12 constitutional questions'), to the Federal Court for determination, pursuant to s. 84 of the CJA. All 12 constitutional questions centered around the fact that the prosecution did not charge the appellant immediately but proceeded with forfeiture applications. After answering all 12 constitutional questions in the negative, noting that they were premature and a repetition of the appellant's previous application to set aside the AMLATFPUAA charges, the High Court Judge ('HCJ') proceeded to dismiss the application on the ground that the application was frivolous and

E

F

G

H

I

would delay the expeditious conduct of the trial. The HCJ then ordered the trial on the AMLATFPUAA charges to proceed at the Sessions Court. Hence, the present appeal. In support of his appeal, the appellant submitted that, *inter alia*, the HCJ (i) acted beyond her judicial power and jurisdiction, under s. 84 of the CJA, by answering and dealing with the merits of the 12 constitutional questions instead of transmitting the questions to the Federal Court for determination; and (ii) erred in holding that the application to refer the 12 constitutional questions was unnecessary and a repetition. The appellant further prayed for an order that the 12 constitutional questions be remitted to another HCJ to be reheard.

Held (dismissing appeal)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The power of the High Court, under s. 84 of the CJA, is discretionary. The High Court is not duty-bound to refer the questions posed by a party to the Federal Court in all cases. The HCJ may stay the proceedings to await the decision of the Federal Court. The fact that the HCJ did not transmit the record to the Federal Court, in the form of a special case, meant that a decision on the question was not necessary for the determination of the proceedings. Notwithstanding the discretionary power of the High Court, it was not necessary for the HCJ to proffer any answer, 'negative' or 'affirmative', to the 12 constitutional questions when dismissing the application. The negative answers were of no consequence and did not bind the Sessions Court. (paras 18 & 22)

(2) Even if the questions came within the ambit of s. 84 of the CJA, the High Court was not obliged in all instances to transmit the questions in the form of a special case to the Federal Court if such a course would delay the trial. Section 84 of the CJA supports the view that an application under it need not be referred to the Federal Court if it will hamper the expeditious conduct of the trial. Section 84(2) provides that the High Court, in referring the questions to the Federal Court, must consider the stage of the hearing where the questions of fact could be settled to assist the Federal Court in deciding the question. In addition, the same provisions stipulate that the purpose of the decision is for the speedy and economical 'final' determination of the proceedings. (para 24)

(3) The HCJ had material to conclude that the instant application was, to a large extent, a 'repetition' which would delay the trial and was therefore an abuse of the process of the court. In fact, the appellant could have raised the constitutional questions in the application to set aside the AMLATFPUAA charges instead of proceeding, by way of instalments, by invoking s. 30 of the CJA. These constitutional questions could also be raised during the appellate stage. The trial of the appellant and the others had been delayed since 2017 because of this and other

applications. There was no reason why another HCJ should be ordered to rehear the application. The trial at the Sessions Court should proceed but with the direction that the purported 'answer' to the questions by the High Court be not treated as binding but heard afresh if they arise again. (paras 26-27)

Obiter:

(1) Once an application is made under s. 30 of the CJA, it is for the subordinate court to transmit the constitutional questions to the High Court to consider whether to proceed under s. 84 of the CJA. In the instant case, the application was withdrawn at the High Court by the appellant. Therefore, it may not be procedurally proper to refile the application at the High Court directly as, under s. 30 of the CJA, such an application could travel to the High Court only from the subordinate court. Furthermore, the appellant had added two more questions that were not included in the application under s. 30 of the CJA. (para 6)

Case(s) referred to:
Gan Boon Aun v. PP [2016] 6 CLJ 647 FC ***(dist)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 53, 55, 56
Courts of Judicature Act 1964, ss. 30, 84(2)
Federal Constitution, arts 5, 7, 8, 13
Malaysian Anti-Corruption Commission Act 2009, ss. 40(1), 41(1)
Securities Industry Act 1983 (repealed), s. 122(1)

For the appellant - Roland Cheng, Ram Singh, Kimberly Ye Wan Chuin & Michele Yee; M/s Roland Cheng & Co
For the respondent - Allan Suman Pillai & Mohd Sophian Zakaria; DPPs

[Editor's note: Appeal from High Court, Kota Kinabalu; Criminal Application No: BKI-44-9-5-2018 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] This is an appeal against the dismissal by the High Court of an application by the appellant to refer 12 purported constitutional questions to the Federal Court. The questions pertain to a criminal trial that is still pending in the Sessions Court. The learned High Court Judge dismissed the application and ordered the trial to proceed in the Sessions Court. In this appeal, the appellant has applied for the case to be remitted to another High Court Judge for the application to be reheard.

Background Facts

[2] The appellant was arrested on 4 October 2016 for the purpose of a major corruption investigation involving the Sabah Water Department of which he was the deputy director. Other senior officers including the director and former deputy director were also arrested. They were charged in court under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the AMLATFPUAA"). However, the appellant was not charged immediately. Instead, the prosecution instituted forfeiture proceedings in respect of his properties and monies. The forfeiture proceedings instituted against the appellant in the High Court were as follows:

(i) Criminal Application No. BKI-44(A)-30-8-2017 against the appellant's 65 landed properties in Sabah under s. 56 of the AMLATFPUAA;

(ii) Criminal Application No. BKI-44(A)-16-7-2017 against the appellant's monies in 67 bank accounts and his son's accounts in four bank accounts under s. 56 of the AMLATFPUAA;

(iii) Criminal Application No. BKI-44(A)-29-7-2017 to restrain the appellant from dealing with his properties in Singapore under s. 53 of the AMLATFPUAA.

[3] The prosecution also instituted Criminal Application No. BKI-64(A)-4-7-2017 in the Sessions Court against the cash monies in ringgit and foreign currency that were recovered from the appellant under s. 41(1) of the Malaysian Anti-Corruption Commission Act 2009 ("the MACC Act").

[4] On 13 December 2017, some 14 months after the arrest of the appellant, the High Court allowed all three applications of the prosecution under the AMLATFPUAA. On the same day, he was brought to the Sessions Court and 146 charges of money laundering under AMLATFPUAA were preferred against him. The present appeal arises from the said AMLATFPUAA case. It is still pending in the Sessions Court. As for the forfeiture proceedings in the Sessions Court under s. 41(1) of the MACC Act, it was dismissed a month later on 30 January 2018 on the ground that the cash monies would be tendered as exhibits in the criminal trial in respect of the 146 AMLATFPUAA charges.

[5] The appellant filed an application to set aside the 146 AMLATFPUAA charges against him in the High Court. He also filed an application in the Sessions Court to refer ten questions to the High Court under s. 30 of the Courts of Judicature Act 1964. Both applications came before the same High Court Judge who commented that there could be "duplicity" as the setting aside application and the application to refer questions of law to the court were both filed at about the same time. By "consent", the appellant withdrew the application to refer questions of law

under s. 30 with liberty to file afresh pending the decision of the High Court in the application to set aside the 146 charges. On 20 March 2018, the High Court dismissed the application of the appellant to set aside the 146 charges. Following the dismissal of the said application, on 8 May 2018, the appellant filed an application in the High Court to refer the same ten constitutional questions plus another two new questions to the Federal Court for determination under s. 84 of the Courts of Judicature Act 1964.

[6] We observe that once an application is made under s. 30, it is for the subordinate court to transmit the constitutional questions to the High Court to consider whether to proceed under s. 84. In the instant case, the application was withdrawn at the High Court by the appellant. Therefore, it may not be procedurally proper to refile the application at the High Court directly as under s. 30, such an application can travel to the High Court only from the subordinate court. Furthermore, the appellant had added two more questions that were not included in the original application before the Sessions Court. Be that as it may, this point was not taken before us by the learned Deputy Public Prosecutor or counsel for the appellant. Therefore, we shall proceed to address the issues raised by the parties.

The "Constitutional Questions"

[7] The questions that the appellant wanted determined by the Federal Court are as follows:

(a) Whether the very existence of 2 procedures under s. 55(1) and s. 56(1) AMLA which allows the Public Prosecutor to first choose whether to forfeit properties with or without prosecution and the Public Prosecutor having elected to proceed on s. 56(1) of AMLA renders the subsequent criminal prosecution under s. 4(1)(a) and (b) of AMLA which may involve s. 55(1) AMLA unconstitutional in violation of Articles 5, 7, 8 and/or 13 of the Federal Constitution?

(b) Whether the very existence of 2 procedures under s. 40(1) and s. 41(1) of MACCA which allows the Public Prosecutor to first choose whether to forfeit properties with or without prosecution and the Public Prosecutor having elected to proceed on s. 41(1) of MACCA renders the subsequent criminal prosecution under s. 4(1)(a) and (b) of AMLA which may involve s. 40(1) of MACCA unconstitutional in violation of Articles 5, 7, 8 and/or 13 of the Federal Constitution?

(c) Whether the very co-existence and operation of the provisions of s. 55(1) and s. 56(1) of AMLA violates Articles 5, 7, 8 and/or 13 of the Federal Constitution?

(d) Whether the very co-existence and operation of the provisions of s. 40(1) and s. 41(1) of MACCA violates Articles 5, 7, 8 and/or 13 of the Federal Constitution?

(e) Whether in instituting forfeiture proceedings under s. 56(1) of AMLA and further leaving open the option of instituting criminal prosecution under s. 41(1)(a) and (b) of AMLA which may involve s. 55(1) of AMLA against the very same accused persons violates Article 7 of the Federal Constitution? A

(f) Whether in instituting forfeiture proceedings under s. 41(1) of MACCA and further leaving open the option of instituting criminal prosecution under s. 4(1)(a) and (b) of AMLA which may involve s. 40(1) of MACCA against the very same accused persons violates Article 7 of the Federal Constitution? B

(g) Whether in preferring multiple criminal proceedings against the accused person under s. 4(1)(a) and (b) of AMLA which may involve s. 55(1) of AMLA after judgment in forfeiture proceedings under s. 56(1) of AMLA in respect of the same subject matter violates Articles 5, 7, 8, and/or 13 of the Federal Constitution? C

(h) Whether in preferring multiple criminal proceedings against the accused person under s. 4(1)(a) and (b) of AMLA which may involve s. 40(1) of MACCA after judgment in forfeiture proceedings under s. 41(1) of MACCA in respect of the same subject matter violates Articles 5, 7, 8, and/or 13 of the Federal Constitution? D

(i) Whether the actions of the Public Prosecutor in first electing to institute forfeiture proceedings under s. 56(1) of AMLA without prosecution and subsequently charging the accused person for the same subject matter under s. 4(1)(a) and (b) of AMLA which may eventually involve s. 55(1) of AMLA violates articles 5, 7, 8, and/or 13 of the Federal Constitution? E

(j) Whether the actions of the Public Prosecutor in first electing to institute forfeiture proceeding under s. 41(1) of MACCA without prosecution and subsequently charging the accused person for the same subject matter under s. 4(1)(a) and (b) of AMLA which may eventually involve s. 40(1) of MACCA violates Articles 5, 7, 8, and/or 13 of the Federal Constitution? F

(k) Whether the affidavits filed by the Applicant in Forfeiture Proceedings without prosecution under s. 56 AMLA and s. 41 MACCA and one (1) Prohibitory Proceeding under s. 53 AMLA whereby the test is on the civil standard of proof can be admitted as evidence in the criminal trial under s. 4(1)(a) and (b) of AMLA against the Applicant pursuant to ss. 71 and 72 AMLA, s. 53 MACCA, ss. 113 and 424 Criminal Procedure Code and s. 132 Evidence Act 1950 without infringing Articles 5, 7, 8 and 145 of the Federal Constitution and the common law right to silence and privilege against self-incrimination? G H

(l) Whether the actions of the Public Prosecutor in first electing to institute civil forfeiture proceedings under s. 56(1) of AMLA without prosecution under High Court Criminal Application No. BKI-44(A)-30/8-2017 and BKI-44(A)-16/7-2017 is estopped and I

A barred from subsequently filing criminal charges against the accused person for the same subject matter under s. 4(1)(a) and (b) of AMLA? If the answer is no, whether the doctrine of *res judicata* applies against the Public Prosecutor in filing criminal charges after the judgment in the civil forfeiture proceedings?

B **Decision Of High Court**

[8] The learned High Court Judge answered all the questions in the negative. Her Ladyship then dismissed the application to refer the said questions for the determination of the Federal Court.

C **Contention Of appellant**

[9] Counsel for the appellant summarised the grounds of appeal into three main grounds as follows:

(i) That the learned High Court Judge acted beyond her judicial power and jurisdiction to answer and deal with the merits of the 12 constitutional
D questions.

(ii) That the learned High Court Judge failed to appraise that 12 constitutional questions are novel issues which concerned with the personal liberty of the appellant under the Constitution.

E (iii) The learned High Court Judge was wrong to hold that the said application is unnecessary, a repetition and an extension of the previous application to strike out the 146 charges.

[10] The argument of counsel for the appellant in respect of the first ground is that the learned High Court Judge exceeded her judicial power and
F jurisdiction under s. 84 of the Courts of Judicature Act 1964 by answering the questions referred by the appellant instead of transmitting the said questions to the Federal Court for determination. In support, counsel for the appellant cited the Federal Court case of *Gan Boon Aun v. PP* [2016] 6 CLJ 647; [2016] 4 MLJ 265 where Zulkefli Ahmad Makinudin CJ (Malaya) held
G that the power to determine a question as to the effect of a provision of the Constitution on a referral under s. 30 of the Courts of Judicature Act 1964 belongs only to the Federal Court.

[11] In respect of the second ground, counsel for the appellant submitted that the learned High Court Judge did not consider whether the 12 questions
H would involve constitutional issues. He submitted that there are novel issues in the instant case as the prosecution had initially proceeded under s. 56 of the AMLATFPUAA and s. 41 of the MACC Act which are applicable for cases where there is no prosecution. However, in the instant case, the prosecution subsequently preferred 146 charges against the appellant. He said
I the prosecution could have applied to forfeit the properties under s. 55 of the AMLATFPUAA after securing a conviction against him. Since the

prosecution obtained forfeiture orders in the High Court, which meant that the predicate offence had been proven, the appellant was prejudiced when he was charged in the Sessions Court. He submitted the factual matrix gives rise to novel questions that must be determined by the Federal Court.

[12] The third main ground was that the learned High Court Judge erred in saying that the referral application was a "repetition" or "extension" to the previous application to set aside the 146 charges. Counsel for the appellant submitted that the issues in the application to set aside the charges were *mala fide*, abuse of court process and/or oppression whereas the issue in the instant application for referral was in respect of the constitutional rights of the appellant and whether ss. 55 and 56 of the AMLATFPUAA were mutually exclusive.

Our Decision

[13] In the instant case, the main complaint is that the learned High Court Judge did not refer the questions raised by the appellant to the Federal Court but answered the questions and consequently dismissed the referral application. The appellant has prayed for an order that the questions be remitted to another learned High Court Judge for decision under s. 84 of the Courts of Judicature Act 1964. Thus, in our view, the questions that arise are whether the learned High Court Judge "answered" the constitutional questions, and if so, whether Her Ladyship erred in doing so. The second issue would be whether she acted within her powers under s. 84 in not referring the questions to the Federal Court and ordering the trial in the Sessions Court to proceed. The third issue would be whether regardless of whether constitutional issues were involved, she exercised her discretion correctly not to refer the questions to the Federal Court.

[14] By way of recapitulation, all the so-called constitutional questions that the appellant wanted answered by the Federal Court spring from the following essential facts. The police launched a corruption investigation involving senior officers of the Sabah Water Department of which the appellant was the deputy director. But he was not immediately charged unlike the director, his wife and his former deputy. The prosecution commenced forfeiture application on the cash monies seized from the appellant, monies in bank accounts and his landed properties. The criminal charges in this case were preferred some 14 months later. By that time, the appellant had filed affidavits to resist the forfeiture application and thereby professedly revealed his defence in respect of monies and properties that were also the subject matter of the charges. Counsel for the appellant submitted that the appellant's rights were prejudiced and several articles of the Constitution namely arts. 5, 7, 8 and/or 13 were infringed.

[15] Counsel for the appellant said that s. 55 in AMLATFPUAA provides for forfeiture in cases where an offence is proved against an accused person. He said this provision would be availed if the appellant is convicted. However, the prosecution used s. 56 of AMLATFPUAA for the forfeiture application in respect of monies in bank accounts and landed properties. He submitted that the provision should only be used for cases where there is no prosecution. He submitted there is a novel question of whether ss. 55 and 56 of the AMLATFPUAA are mutually exclusive. Similar argument was also made in respect of the cash monies seized from the appellant. As we said earlier, the cash monies were subjected to forfeiture application under s. 41(1) of the MACC Act. The application was eventually dismissed on 30 January 2018. Section 41(1) allows the prosecution to apply for forfeiture if there is no prosecution or conviction for 18 months after seizure. Counsel for the appellant pointed out that s. 40(1) of the MACC Act also provides for forfeiture after an offence against the Act is proved. However, in this case, the prosecution elected to use s. 41(1) after the appellant was arrested as no prosecution was instituted. Counsel for the appellant argued that there would be a breach of the doctrine of *res judicata* as criminal charges were preferred after conclusion of the forfeiture applications in s. 56 of the AMLATFPUAA and s. 41(1) of the MACC Act. This point was also alluded in the 12 "constitutional" questions.

Duty Of Court In A Reference Application

[16] Section 30 of the Courts of Judicature Act 1964 provides that a party may apply to the presiding officer of the subordinate court to transmit the record to the High Court if any question arises as to the effect of any provision of the constitution. Upon receipt of the record, a judge of the High Court "shall" examine it and if he considers that the decision of a question as to the effect of a provision of the Constitution "is necessary", he shall proceed to deal with it under s. 84 of the Courts of Judicature Act 1964. It reads as follows:

> (1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.
>
> (2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with s. 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.
>
> (3) Subsections (1) and (2) shall be deemed to be rules of court for the purposes of art. 128(2) of the Constitution.

[17] Section 84 is similarly worded as s. 30. It reads as follows: A

(1) Where in any proceedings in the High Court a question arises as to the effect of any provision of Constitution the judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

(2) An order staying proceedings under this section may be made by the judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings. B C

(3) Where an order for stay of proceedings has been made under this section the judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative. D

(4) Where a judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

[18] In the instant case, the record was transmitted to the High Court. The power of the High Court under s. 84 is discretionary. The High Court is not duty-bound to refer the questions posed by a party to the Federal Court in all cases. This much is clear from the wording of s. 84 and the judgment of the Federal Court in the case of *Gan Boon Aun v. PP* (*supra*). He "may" stay the proceedings to await the decision of the Federal Court. If he stays the proceedings, he shall also state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case. E F

[19] However, as stated in *Gan Boon Aun v. PP* (*supra*) and pointed out by counsel for the appellant, the High Court is not required to answer a question as to the effect of any provision of the Constitution. In the said case, the Sessions Court referred the question whether s. 122(1) of the now repealed Securities Industry Act 1983 ("SIA") was unconstitutional to the High Court under s. 30 of the Courts of Judicature Act 1964. Instead of dismissing the application or referring the question in the form of a special case to the Federal Court, the High Court declared s. 122(1) of the SIA as unconstitutional and struck it down. The accused was acquitted and discharged. The Court of Appeal reversed the decision and held that s. 122(1) was valid. Upon appeal, the Federal Court held that if the High Court finds that there is a constitutional issue on matters referred under s. 30 that is necessary for the determination of the proceedings in the Sessions Court, it G H I

A is the duty of the High Court to transmit the question in the form of a special case to the Federal Court. Zulkefli Ahmad Makinudin CJ (Malaya) emphasised that the power to determine the said question belongs to the Federal Court and not the High Court. The relevant passages appear below:

> [21] We would take the view that under s. 30 of the CJA the High Court
B judge has to consider and decide whether there is a question of constitutional issue on matters referred to it by the sessions court necessary for the determination of the proceedings before the sessions court. If there is none the High Court Judge must send the case back for continued hearing before the Sessions Court. On the other hand if the
C High Court finds that a decision on a question as to the effect of a provision of the constitution is necessary for the determination of the proceedings in the Sessions Court it is the duty of the High Court Judge under s. 84 to state the question which in the opinion of the High Court Judge had arisen as to the effect of the provision of the constitution in the form of a special case which shall permit of an answer being given in
D the affirmative or the negative. Once that is done, the High Court judge shall transmit the special case to the Federal Court in accordance with the Rules of the Federal Court.
>
> [22] It is to be stated here that nowhere in ss. 30 and 84 of the CJA is power given to the High Court Judge to determine a question which concerns the effect of a provision of the constitution which had arisen in
E the subordinate court and in respect of which the record of proceedings have been transmitted to the High Court by the subordinate court under s. 30 of the CJA. That power belongs to the Federal Court.

[20] In the instant case, at the outset, in para. [7] of her judgment, the learned High Court Judge cited *Gan Boon Aun v. PP* (*supra*) and directed
F herself that she has to consider whether there is a constitutional issue on matters referred that is necessary for the determination of the proceedings in the Sessions Court.

[21] However, Her Ladyship's gave a negative answer to the said questions
G and ruled as follows:

> Due to the reasons above, I find that that there is no merit in the criminal application BKI-44-112-2018 and BKI-44-915-2018 and therefore I dismissed this application and case is remitted back to the Session's Court and order the trial to proceed expeditiously.

H **[22]** Notwithstanding the discretionary power of the High Court, having regard to the plain words of ss. 30 and 84, we would agree with counsel for appellant that it was not necessary for the learned High Court Judge to proffer any answer, "negative" or "affirmative" to the questions posed by the appellant when dismissing the application. Therefore, the negative answers
I are of no consequence and do not bind the Sessions Court. However, the "negative" answer given by learned High Court Judge does not necessarily mean that she did not address her mind to the duty imposed under the said

provisions to consider whether there was a question necessary for the determination of the proceedings. As we said earlier, it was within the discretion of the High Court not to transmit the record to the Federal Court in the form of a special case and the fact that learned High Court Judge did not do so means that a decision on the question was not, to quote the words of the s. 30, "necessary for the determination of the proceeding". A B

[23] We also think that the case of *Gan Boon Aun v. PP* (*supra*) which was relied on heavily by counsel for the appellant ought to be distinguished. In that case, the High Court answered the constitutional question in the affirmative instead of stating the question in the form of a special case to the Federal Court and acquitted and discharged the accused person. It was for this reason, the order was set aside and remitted to the High Court for the application to be reconsidered whether it should be transmitted to the Federal Court in the form of a special case. C

[24] Lastly, even if the questions come within the ambit of s. 84, the High Court is not obliged in all instances to transmit the questions in the form of a special case to the Federal Court if such a course would delay the trial. The permissive "may" is employed in s. 84 as pointed out in *Gan Boon Aun v. PP* (*supra*). In the instant case, High Court did not refer the questions to the Federal Court for another reason. The learned High Court Judge found that the application was frivolous and would delay the expeditious conduct of the trial. This finding is quite clear from her judgment. In para. [14] of her judgment, she quoted a passage from the judgment of *Gan Boon Aun v. PP* (*supra*) where the Federal Court cautioned that an application under s. 30 could be a frivolous application that is intended to delay the conduct of the trial. A careful reading of s. 84 would support the view an application under it need not be referred to the Federal Court if it will hamper the expeditious conduct of the trial. "Determination of the proceeding" in ss. 30 and 84 means final resolution of the proceedings. We say so for the following reasons. Section 84(2) says that the High Court in referring the questions to the Federal Court must consider the stage of the hearing where questions of fact can be settled to assist the Federal Court in deciding the question. In addition, the same provision says that the purpose of the decision is for the speedy and economical "final" determination of the proceedings. D E F G

[25] There was a good reason why the learned High Court Judge belaboured the "expeditious conduct of trial" point. As we pointed out earlier, all the purported constitutional questions only arise from the fact the prosecution did not charge the appellant immediately but proceeded with forfeiture applications. We are mindful that the appellant did not cite any purported breach of constitutional provisions in his previous application to strike out the charges but it is nonetheless based on the very same facts as H I

A the instant application, ie, that the prosecution elected to proceed by way of forfeiture application before preferring the 146 charges. This is clear from para. (1) of the notice of motion in the striking out application which reads as follows:

> 1(a) The conduct of the Public Prosecutor by initiating two (2) Forfeiture Proceedings, one (1) Prohibitory Proceeding in High Court and one (1) Forfeiture Proceeding in the Sessions Court and after obtaining judgments in the High Court on 13.12.2017 had subsequently thereafter on 13.12.2017 instituted 146 charges against the Applicant/Accused in the Sessions Court (hereinafter referred to as "said 146 charged") amount to multiplicity of criminal proceedings, is *mala fide*, oppressive and an abuse of the process of the court;

[26] In the premises, the learned High Court Judge had material to conclude that the instant application was to large extent a "repetition" which would delay the trial and is therefore an abuse of the process of the court. In fact, the appellant could have raised the constitutional questions in the striking out application instead of proceeding by way instalments by invoking s. 30 of the Courts of Judicature Act 1964. That is why in answering the questions posed by the appellant, apart from providing a negative answer to the questions, the learned High Court Judge also said that the questions were "premature" and a "repetition". In fact, the trial of the appellant and others has been delayed since 2017 because of this and other applications.

Conclusion

[27] For all the above reasons, we cannot say that the learned High Court Judge was plainly wrong when she refused to exercise her discretion under s. 84 of the Courts of Judicature Act 1964. Therefore, there is no reason why we should order another High Court Judge to rehear the application. The questions posed by the appellant could all be raised at the trial in the Sessions Court or during the appellate stage. For this reason, the trial in the Sessions Court should proceed but with the direction that the purported "answer" to the questions by the High Court be not treated as binding but heard afresh if they arise again. We shall therefore dismiss the appeal.